IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 27.6.2006

Coram:

The Hon'ble Mr.JUSTICE S.RAJESWARAN

C.R.P.(PD) No.811 of 2004

ELGI Finance Ltd.
Coimbatore 641018 .. Petitioner/Plaintiff

vs.

Essrope Mills Ltd.
Coimbatore 641 035 .. Respondent/Defendant

Revision Petition filed against the order dated 7.4.2003, made in I.A.No.636/2002 in O.S.No.768/1998, on the file of the I Addl.Sub-Court, Coimbatore.

For Petitioner : M/s.Rupert J.Barnabas
For Respondent : Mr.C.Dhanasekaran

ORDER:

The above Revision Petition has been filed by the plaintiff against the fair and decretal order in I.A.No.636/2002 in O.S.No.768/1998 dated 7.4.2003 passed by the learned I Addl. Sub-Judge, Subordinate Court, Coimbatore.

2. The petitioner/plaintiff, ELGI Finance Ltd. is a Public Limited Company at Coimbatore dealing in the business of finance and Hire Purchase Leasing. The respondent being a Private Textile Mill, approached the petitioner-plaintiff to hire purchase 22 machineries. The same was agreed to by the petitioner/plaintiff and 22 Hire Purchase Agreements were executed between 1997 and 1998. Due to defaults committed by the respondent, the arrears got accumulated and the respondent as on 6.6.1998, was to pay a sum of Rs.73,70,584/- to the petitioner/plaintiff towards the monthly instalments and hired purchase of the plant and machineries. The legal notice issued by the petitioner/plaintiff did not evoke proper response. The right of the petitioner/plaintiff to re-possess the plant and machineries was opposed and objected to by the respondent.

3. Therefore the petitioner filed a suit in O.S.No.768/1998 on the file of the Sub-Court, Coimbatore and sought for permanent injunction

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against the respondent not to interfere in any manner or obstruct or prevent them from re-possessing the plant and machineries.

4. It is seen that the respondent filed I.A.No.636/2002 in O.S.No.768/1998 and obtained an order of stay of all proceedings in the suit pending disposal of the case No.300/1999 on the file of the Board for Industrial and Financial-reconstruction, hereinafter called 'BIFR', at New Delhi. According to the respondent, the company is sick within the meaning of Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter called 'the Act') and consequently the provisions of Sec.22 (1) of the Act would apply.

5. As against the order of stay obtained by the respondent in I.A.No.636/2002 the petitioner/plaintiff has filed this Civil Revision Petition.

6. Learned counsel for the petitioner submitted that the trial court had committed a grave error in granting an order of stay. Further it is stated that the provisions of Sec.22(1) of the Act would not apply to the respondent's case at all. It is further added that in the agreement the ownership of the plant and machineries remained with the lessor. Therefore it is his case that by merely registering with the BIFR, the right of the petitioner would in no way be affected.

7. In support of his contentions, the learned counsel for the petitioner relied on the following judgments:-

(1) AIR 1997 Bom. 401 (M/s.Kotak Mahendra Finance Ltd. v. M/s.Deve Paints Ltd.). (2) (1999)96 Comp Cas 192(Delhi) (GE C.T.F.S.Ltd. v. Dee Pharma Ltd.). (3) (2001)106 Comp Cas 473(Delhi) (Jindal Menthol & Investments v. P.I.Ltd.) and (4) (2002)109 Comp Cas 906(Mad.) (O.S.F. Ltd. v. Sri Sivakaami Mills Ltd. (Mad.)

8. Per contra, learned counsel for the respondent while reiterating the averments made in the counter affidavit, has stated that the BIFR has evolved a scheme for rehabilitation and the same is under implementation. Therefore, according to him, Sec.22(1) of the Act would apply and the order of stay granted by the trial court should not be disturbed.

9. He relied on the following judgments in support of his submissions:-

(1) AIR 1992 S.C. 1439 (M/s.Shree Chamundi Mopeds Ltd. v. Church of S.I.T. Assocn.) (2) (1997)90 Comp Cas 340 (Delhi)(Blue Star v. Hindustan Photo Films MFG. Co. (Delhi) (3) status-quo order of the Hon'ble Supreme Court made in S.L.P.(Civil) No.23576/2003 dated 10.12.2003 and (4) Interim order of the Hon'ble Supreme Court dated 1.4.2005 in the above S.L.P.(Civil) No.23576/2003.

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10. Heard the learned counsel for the petitioner as well as the learned counsel for the respondent. I have also gone through the documents filed by them and the judgments referred to by them.

11. The revision petitioner/plaintiff filed a suit for the limited purpose of re-possessing the machineries covered under the Hire Purchase Agreements, as the respondent/defendant was due to pay a sum of Rs.73,70,584/- as on 6.6.1998. After filing the written statement, the respondent/defendant filed I.A.No.636/2002 praying to grant an order of stay of all further proceedings in the suit until the conclusion of the proceedings in Case No.300/1999 pertaining to the defendant company before the BIFR. In the affidavit filed in support of I.A.No.636/2002, it was specifically averred that the defendant company is entitled to protection under Sec.22(1) of the Act and the suit proceedings ought to be stayed till the case is completed before the BIFR. This Application was resisted by the petitioner/plaintiff stating that Sec.22(1) of the Act would not be applicable to the present case as the plaintiff is the owner of the machineries and as such the suit proceedings cannot be stayed.

12. The learned trial Judge by order dated 7.4.2003 accepted the contentions of the petitioner/defendant that Sec.22(1) of the Act would apply to the facts of case and thereby stayed all further proceedings in the suit.

13. The point for consideration before this court is whether the respondent/defendant company is entitled to protection under Sec.22(1) of the Act.

14. Sec.22(1) of the Act is extracted below:-

> "22. Suspension of legal proceedings, contracts, etc.
>
> (1) Where in respect of an industrial company, an inquiry under section 16 is pending or any scheme referred to under section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under section 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956, or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof (and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advantage granted to the industrial company) shall lie

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or be proceeded with further, except with the consent of the Board or, as the case ;may be, the appellate authority".

15. A close reading of Sec.22(1) of the Act makes it very clear that when an enquiry under Sec.16 is pending or any scheme under Sec.17 is under consideration or a sanctioned scheme is under implementation or an appeal under Sec.25 is pending, then, no proceedings (1) for winding up of the industrial company or (2) execution, distress or the like against any of the properties of the company (emphasis supplied) or (3) for the appointment of a receiver in respect thereof or (4) no suit for the recovery of money or (5) for the enforcement of any security against the company and (6) or of any guarantee in respect of any loans or advances granted to the company shall lie or be proceeded with, except with the consent of the Board or the appellate authority.

16. The suit was filed by the petitioner/plaintiff herein for a permanent injunction restraining the respondent/defendant from obstructing or interfering or preventing the repossession by the plaintiff of the plant and machineries enumerated in the schedule No.1 to the plaint from the premises of the defendant.

17. It is the case of the petitioner/plaintiff that under the Hire Purchase Agreement, the plaintiff is the owner of the machineries until the entire instalments are paid by the respondent/defendant and there are no clauses in the Hire Purchase Agreement enabling the petitioner/plaintiff for retaking possession of the hired articles in case of default in the payment of instalments. As the respondent/defendant was due to pay a sum of Rs.73,70,584/- as on 6.6.98, they are well within their right to repossess the hired machineries as ownership vested with the plaintiff.

18. I find force in the submission of the learned counsel for the petitioner/plaintiff. The suit filed by the plaintiff is not for winding up or for execution, distress or the like against any of the properties of the respondent/defendant. The properties, namely, the machineries are still the properties of the petitioner/plaintiff and the prayer in the suit is only for mere injunction restraining the respondent/defendant from obstructing the repossession of the machineries from the premises of the respondent/defendant. No relief by the petitioner has been sought for, for the recovery of the money or for the enforcement of any security and in such circumstances, Sec.22(1) of Act will not apply to the facts of this case.

19. In AIR 1997 Bom. 401 (supra), the similar question came up for consideration before the Bombay High Court and it was held as follows:-

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"7. Scan of S.22(1) indicates that the following categories of the proceedings are prohibited and liable to be suspended where an inquiry u/S.16 is is pending or any scheme u/S.17 under preparation or a sanctioned scheme is under implementation in respect of an industrial undertaking or an appeal is pending under S.25. The said categories are (i) proceedings for the winding up for the industrial company, (ii) proceedings for execution , distress or like which are taken against any of the properties of the industrial company, (iii) proceedings for appointment of receiver, (iv) suit for recovery of money against the industrial company, (v) suit for the enforcement of any security against the industrial company; (vi) suit for enforcement of any guarantee in respect of any loans and or the advance granted to the industrial company. The aforesaid categories of the proceedings have to be suspended if already pending against the industrial undertaking and shall not lie against industrial company if not instituted so long as conditions prescribed under S.22(1) are satisfied. The present case is not concerned with the proceedings for winding up of the lessee company, nor the finance company has filed any suit for recovery of money or for the enforcement of any security against the lessee company, nor any suit has been filed by the finance company against the lessee company for enforcement against the lessee company for enforcement of any guarantee in respect of any loans and advance. Here are the suits filed by the lessee company who claims to be sick industrial company against, the finance company from taking possession of various vehicles owned by the finance company and which have been given on lease to the lessee company. The answerable question, therefore, is whether the properties which are not owned by the sick industrial undertaking are covered under Section 22(1) of the Act of 1985? If the finance company resorts to recovery of its properties viz. its vehicles which have been given on lease to the lessee company, it cannot be said that it is property of lessee company (sick industrial undertakings) or it is covered under Section 22(1) or such recourse can be equated with the kind of proceedings contemplated under Sec.22(1). The expression "against the properties" occurring in Section 22(1) is not without significance because it implies that action of winding up or for execution, distress or such like proceeding must be against the property of the sick industrial company. It is true that that by the Sick Industrial Companies

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(Special Provisions) Amendment Act, 1993 Section 22(1) was amended and, "and no suit for the recovery of money or for the instrument of any security against the industrial company or guarantee in respect of any loans or advances granted to the industrial company" was inserted after, "no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of receiver in respect thereof", but the said amendment cannot be of any help to the lessee company because as observed above, so far as finance company is concerned it has not filed any suit against the lessee company for recovery of money against the industrial company or for enforcement of any security against the lessee company or for enforcement of guarantee in respect of any loans given to the lessee company or for any advance granted to the lessee company.

8. In M/s.Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association, Madras, AIR 1992 SC 1439, the Apex Court was dealing with the question whether lease hold right of sick company in the premises leased out to it is a property of the sick company and whether Section 22(1) was attracted and eviction proceedings could not continue against the sick industrial company. The Apex Court held thus (at p. 1445 of AIR):

12.Eviction proceedings initiated by a landlord against a tenant company would not fall in categories (1) and (3) referred to above. The question is whether they fall in category(2). It has been urged by the learned counsel for the appellant company that such proceedings fall in category (2) since they are proceedings against the property of the sick industrial company. The submission is that the lease hold right of the appellant company in the premises leased out to it is property and since the eviction proceedings would result on the appellant-company being deprived of the said property, the said proceedings would be covered by category (2). We are unable to agree. The second category contemplates proceedings for execution, distress or the like against any other properties of the industrial company. The words of the like have to be construed with reference to the preceding words, namely, for execution, distress which means that the proceedings which are contemplated in this category are proceedings whereby recovery of dues is sought to be

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made by way of execution, distress of similar process against the property of the company. Proceedings for eviction instituted by a landlord against a tenant who happens to be a sick industrial company, cannot in our opinion, be regarded as falling in this category. We may, in this context, point out that, as indicated in the Preamble, the Act has been enacted to make special provisions with a view to securing the timely detection of sick and potentially sick companies owning industrial undertakings, the speedy determination by a Board of experts of the preventive, ameliorative remedial and other measures which need to be taken with respect to such companies and the expeditious enforcement of the measures so determined, the provision regarding suspension of legal proceedings contained in Section 22(1) seeks to advance the object of the Act by ensuring that a proceeding having effect on the working or the finances of a sick industrial company shall not be instituted or continued during the period the matter is under consideration before the Board or the Appellate Authority or a sanctioned scheme is under implementation without the consent of the Board or the Appellate Authority. It could not be the intention of Parliament in enacting the said provision to aggravate the financial certificates of a sick industrial company while the said matters were pending before the Board of the Appellate Authority by enabling sick industrial company to continue to incur further liabilities during this period. This would be the consequence if sub-section (1) of Section 22 is construed to bring about suspension of proceedings for eviction instituted by landlord against a sick industrial company which has ceased to enjoy the protection of the relevant rent law on account of default in payment of rent. It would also mean that the landlord of such a company must continue to suffer a loss by permitting the tenant (sick industrial company) to occupy the premises even though it is not in a position to pay the rent. Such an intention cannot be imputed to Parliament we are, therefore, of the view that Section 22(1) does not cover a proceeding instituted by a landlord of sick industrial company for the eviction of the company premises let out to it.

9. The Apex Court thus held that the occupation of the premises by the sick industrial company as statutory tenant cannot be regarded as property of such company for the purposes of sub-section (1) of Section 22 and, therefore, Section 22 was not attracted.

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> 10. Applying the aforesaid ratio of the Apex Court, I have no hesitation in holding that the contention of the lessee company that Section 22(1) of the Act of 1985 is attracted is wholly misconceived. The finance company cannot be asked to approach BIFR Board for the recovery of its properties viz. vehicles in the present case from the lessee company when the said vehicles are not the properties of the sick industrial company (lessee company) and are not covered under Section 22(1)of the Act of 1985."

20. In the above judgment, it was held that the finance company cannot be asked to approach the BIFR for the recovery of its properties from the company when the properties are not the properties of the sick company.

21. In (1999)96 Comp Cas 192 (Delhi) (supra), the Delhi High Court held as follows:-

> "15. ... A perusal of these clauses show that the ownership of the machinery vested with the petitioner though possession of the same was with the respondent merely putting the possession of the machinery at the disposal of the respondent by no stretch of imagination would mean that the ownership of the property vested in the respondent-company. Since the respondent-company is not the owner of the machinery in question, therefore, mere registering of the case by the BIFR would not disentitle this court to pass an order as prayed for by the petitioner because the property does not belong to the respondent-company."
> .... "For the reasons stated above, the respondent cannot take shelter or benefit of the provisions of section 22(1)of the Sick Industrial Companies (Special Provisions) Act nor the provisions of section 22(1)are attracted in the facts of this case. .."

22. In the above judgment also, the Delhi High Court held that under the Hire Purchase Agreement, the ownership of the machinery vested with the financier-owner. Though the possession was with the hirer and since hirer was not owner of the company, hirer could not take shelter under Sec.22(1) of the Act.

23. In (2002)106 Comp Cas 473 (Delhi) (supra), the Delhi High Court reiterated the law by observing that the ownership of the leased equipment remained with the finance company and therefore the provisions of Sec.22 would not apply.

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24. In (2002)109 Comp Cas 906 (Mad.) (supra), this court held as follows:-

> "Learned counsel for the applicant further stated that the first defendant was declared a sick industrial company and at the time of filing the suit, the applicant had not secured the consent of the BIFR as required under section 22 of the Sick Industrial Companies (Special Provisions) Act. The applicant already filed Application No.1563 of 1998 for appointment of an advocate-commissioner to repossess the leased assets and only notice was ordered. The first defendant filed the counter objecting to the same that it being a sick industrial company, the applicant is not entitled to repossess the same. Now, the BIFR by its order dated February 29, 2000, granted permission to the applicant to initiate and continue the legal proceedings subject to the condition that any decree passed in the suit would not be executed without the consent of the BIFR. It also permitted the applicant to repossess the equipment that had been leased to the first defendant. Now, the permission has been obtained from BIFR. Apart from that, section 22 of the Sick Industrial Companies (Special Provisions) Act will not be a bar to prevent the applicant from repossessing the machinery which was leased out. It is settled position of law that only for recovery of the money, there will be a bar under section 22, but for repossessing the equipment there cannot be any bar since the applicant is the owner of the machinery and the respondents are only hirers. Hence, I am of the view that the applicant is entitled to repossess the machinery."

25. In the above judgment, this court observed that Sec.22 of the Act will not be a bar to prevent the applicant from repossessing the machinery which was leased out and only for recovery of money, there will be a bar under section 22 of the Act.

26. Learned counsel for the respondent relied on the judgment of AIR 1992 S.C. 1439 (supra), wherein it was held as follows:-

> "12. Eviction proceedings initiated by a landlord against a tenant company would not fall in categories (1) and (3) referred to above. The question is whether they fall in category (2). It has been urged by the learned counsel for the appellant company that such proceedings fall in category (2) since they are proceedings against the property of the sick industrial company. The submission is that the leasehold right of

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the appellant-company in the premises leased out to it is property and since the eviction proceedings would result in the appellant-company being deprived of the said property, the said proceedings would be covered by category (2). We are unable to agree. The second category contemplates proceedings for execution, distress or the like against any other properties of the industrial company. The words 'or the like' have to be construed with reference to the preceding words, namely, 'for execution, distress' which means that the proceedings which are contemplated in this category are proceedings whereby recovery of dues is sought to be made by way of execution, distress or similar process against the property of the company. Proceedings for eviction instituted by a landlord against a tenant who happens to be a sick company, cannot in our opinion, be regarded as falling in this category. We may, in this context, point out that, as indicated in the Preamble,the Act has been enacted to make special provisions with a view to securing the timely detection of sick and potentially sick companies owning industrial undertakings, the speedy determination by a Board of experts of the preventive, ameliorative, remedial and other measures which need to be taken with respect to such companies and the expeditious enforcement of the measures so determined. The provision regarding suspension of legal proceedings contained in Section 22(1) seeks to advance the object of the Act by ensuring that a proceeding having an effect on the working or the finances of a sick industrial company shall not be instituted or continued during the period the matter is under consideration before the Board or the Appellate authority or a sanctioned scheme is under implementation without the consent of the Board or the Appellate Authority. It could not be the intention of Parliament in enacting the said provision to aggravate the financial difficulties of a sick industrial company while the said matters were pending before the Board of the Appellate Authority by enabling a sick industrial company to continue to incur further liabilities during this period. This would the consequence if sub-section (1) of S.22 is construed to bring about suspension of proceedings for eviction instituted by landlord against a sick industrial company which has ceased to enjoy the protection of the relevant rent law on account of default in payment of rent. It would also mean that the landlord of such a company must continue to suffer a loss by permitting the tenant (sick industrial

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company) to occupy the premises even though it is not in a position to pay the rent. Such an intention cannot be imputed to Parliament. We are, therefore, of the view that Section 22(1) does not cover a proceeding instituted by a landlord of a sick industrial company for the eviction of the company premises let out to it."

27. In the above judgment, the Hon'ble Supreme Court pointed out that the object of the Act is to secure the timely detection of sick and potentially sick companies and Sec.22(1) seeks to advance the object of the Act by ensuring that a proceeding having an effect on the working or the finances of a sick company shall not be instituted or continued during the period the matter is under consideration before the Board or the Appellate Authority.

28. By relying on the judgment, learned counsel for the respondent/defendant submitted that if the machineries are allowed to be repossessed as prayed for by the petitioner in the suit, it would have an adverse effect on the working of the respondent company and therefore keeping in mind the object of the Act, the suit proceedings are rightly stayed by the trial court.

29. I am unable to accept this argument of the learned counsel for the respondent/defendant for the reason that Sec.22(1) does not deal with a proceeding to repossess the properties of the owner and Sec.22(1) would apply only when the properties are owned by the sick company. Moreover, this judgment was referred to by the Bombay High Court in AIR 1997 Bom. 401 (supra) and still it was held that the finance company cannot be asked to approach BIFR for recovery of its properties.

30. The judgment relied on by the learned counsel for the respondent reported in (1997)90 Company Cases 340 (Mad.) (supra), does not dealt with the facts as arose in the present case and this court only held that application filed against sick companies under section 41B of the Arbitration Act, 1940, to restrain the company from making use of the property and to direct it to furnish bank guarantee are barred by section 22(1) of Act.

31. In an identical situation, a Division Bench of this court by judgment dated 3.12.2003 rendered in O.S.A.No.89/2003 held that until the payment of all the instalments are made by the hirer, the ownership of the hired machinery would remain with the financier and hence the proceedings do not fall within the scope of Sec.22(1) of the Act. The Division Bench has also referred to the judgment reported in AIR 1992 SC 1439 (M/s.Shree Chamundi Mopeds Ltd. v. Church of S.I.T. Association) and 90 Company Cases 340 (supra) and observed that those cases are pertaining to action initiated in respect of the hired machineries. It is also very relevant to add here that the respondent in the present case is the respondent in the above O.S.A. also.

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32. The judgment of the Division Bench of this court rendered in O.S.A.No.89/2003 is binding on me but the learned counsel for the respondent brought to my notice the subsequent S.L.P. filed by them against the judgment dated 3.12.2003 in OSA No.89/2003 and the order of status quo as to the machinery passed by the Hon'ble Supreme Court on 10.12.2003 and the subsequent order dated 1.4.2005 granting leave and continuing the interim order in the very same SLP, namely, SLP (Civil) No.23576/2003. Based on these two interim orders, learned counsel for the respondent submitted that the order of stay granted by the court is to be necessarily continued.

33. I am unable to accept this submission also. The judgment dated 3.12.2003 in OSA No.89/2003 was not at all stayed by the Hon'ble Supreme Court, excepting to order status quo as to machinery. In such circumstances, I am bound by the decision of the Division Bench of this court dated 3.12.2003 in OSA No.89/2003 and applying the ratio laid down by the Division Bench, I have to necessarily hold that O.S.No.768/1998 filed by the revision petitioner is not to be stayed as Sec.22(1) of the Act will not apply to the facts of this case.

34. In the result, the order of the trial court dated 7.4.2003 staying the suit proceedings is erroneous and liable to be set aside.

35. Accordingly, the order dated 7.4.2003 made in I.A.No.636/2002 in O.S.No.768/1998 is set aside and the Civil Revision Petition is allowed. No costs.

sks

Sd/
Asst.Registrar

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Sub Asst.Registrar

To

The I Additional Sub-Judge, Coimbatore.

1 cc To Mr.Rupert J.Barnabas, Advocate, SR.27531.
1 cc To Mr.C.S.Dhanasekaran, Advocate, SR.27145.

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